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NO. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

EXECUTIVE LEASING CORPORATION,
MANUEL GONZALEZ GIERBOLINI, and
LUZ IRAIDA GONZALEZ,
Petitioners,

v.

BANCO DE PONCE, BANCO POPULAR DE
PUERTO RICO, and BANPONCE CORP.,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in relying solely upon a state-law parol evidence rule to exclude evidence of an oral tying arrangement imposed by a lender in violation of the federal Bank Holding Company Act, 12 U.S.C. §1972.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez.

The respondents are Banco de Ponce (now Banco Popular de Puerto Rico as Successor in Interest), Banco Popular de Puerto Rico, and Banponce Corp.

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1.

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**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on February 27, 1995, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Bownes, J.) is reported at 48 F.3d 66 (1st Cir. 1995), and is reprinted in the appendix hereto, at pages 16A to 25A. The Opinion and Order of the Magistrate Judge (Arenas, M.J.) is unreported, and is reprinted in the appendix hereto, at pages 1A to 14A.

JURISDICTION

Petitioners appeal from a judgment entered by the First Circuit Court of Appeals on February 27, 1995. Petitioners filed a petition for rehearing on March 13, 1995. The petition was denied on March 28, 1995. Appendix at 26A-28A. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

12 U.S.C. §1972(1). Certain tying arrangements prohibited; correspondent accounts.

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
> >
> > (C) that the customer provide some additional credit, property, or service to such bank, other than those re-

> lated to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.[1]

STATEMENT OF THE CASE

Introduction

This is a petition for review of a decision of the United States Court of Appeals for the First Circuit. The First Circuit's decision affirmed an order of the United States District Court for the District of Puerto Rico which granted summary judgment dismissing the claims of petitioners Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luz Iraida Gonzalez (collectively "Executive Leasing") against respondent Banco de Ponce ("Banco") for violating the tying provisions of 12 U.S.C. §1972 ("§1972") of the Bank Holding Company Act ("BHCA").[2] This statute, among other things,

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[1] The full text of 12 U.S.C. §1972 is set out in the appendix at pages 29A to 36A.

[2] The federal district court had jurisdiction over Executive Leasing's BHCA claims under 28 U.S.C. §1331, and had jurisdiction over the pendent state-law claims under 28 U.S.C. §1332.

prohibits a bank from requiring, as a condition on the extension of credit, that a borrower refrain from dealing with another bank.

Executive Leasing, which had a line of credit with Banco, alleged that Banco violated §1972(1)(E) by conditioning its extension of credit on the requirement that Executive Leasing refrain from obtaining financing for its business from any other lending institution. The District Court, however, granted summary judgment for Banco because the condition was not contained in the written loan agreement. Although Executive Leasing had alleged a violation of §1972, a federal statute, the District Court applied Puerto Rico's parol evidence rule to exclude Executive Leasing's proof that Banco had orally imposed a tying condition in violation of §1972. The First Circuit affirmed despite Executive Leasing's arguments that other federal circuits allow the use of parol evidence to establish violations of federal antitrust statutes that prohibit tying.

The First Circuit's decision on this important issue of federal law should be reviewed and reversed. In holding that evidence extrinsic to a written agreement may not be used to prove a violation of 12 U.S.C. §1972 because state law would not allow such evidence to prove state-law claims, it has rendered a decision that conflicts directly with a decision of the Fifth Circuit Court of Appeals under §1972. The First Circuit's decision also conflicts with decisions of other federal circuits which have allowed the introduction of evidence of oral conditions to establish violations of tying prohibitions like §1972 in other federal antitrust laws.

The First Circuit's decision should also be reviewed and reversed because it thwarts the intent of Congress by impermissibly limiting the scope of the anti-tying provisions in §1972, and by condoning tying conditions, no matter how harmful to free competition, so long as those conditions are not put in writing. By applying Puerto Rico's parol evidence rule to bar proof of a violation of a federal antitrust statute, the First Circuit's decision further contradicts the intent of Congress by allowing the parol evidence rule of the particular forum to determine the scope of the substantive prohibitions of the federal statute. This conclusion is unprecedented. Congress cannot have intended any such result when, at the behest of the President of the United States, it enacted sweeping, nationwide prohibitions of

anticompetitive lending practices.

Statement of Facts

Executive Leasing entered a loan agreement with Banco in May 1983 to obtain a revolving line of credit to finance its principal business, long-term vehicle leasing. Executive Leasing alleged that, as a condition to the extension of credit, Banco imposed an oral requirement that Executive Leasing refrain from financing its leasing business with any other bank. The exclusive dealing condition is not contained in the written loan documents, but was imposed orally. Appendix at 2A, 4A, 5A, 10A, 11A, 19A-22A.

The collateral for the loan included an assignment of lease contracts, rental payments, and accounts receivable, as well as promissory notes and personal guaranties made by the individual plaintiffs. The loan agreement was modified several times over the course of the financing relationship. On January 13, 1984, July 2, 1984, and August 13, 1985, the agreement was amended to increase the line of credit. The line of credit was decreased in December 1986. In December 1987 Banco called the loan, and in March 1988 the loan agreement was terminated. Appendix at 9A, 10A, 19A, 20A.

Executive Leasing alleged, and sought to prove, that Banco's oral imposition of the exclusive dealing condition violated 12 U.S.C. §1972(1)(E).[3] It alleged that this condition, which made Executive Leasing fatally dependent on Banco, was used by Banco (after it had acquired Velco, the largest leasing company in Puerto Rico as an affiliate in 1986) to drive Executive Leasing out of business and take over its vehicle leasing operations for the benefit of Velco. Executive Leasing alleged that, to accomplish these ends, Banco used not only the exclusive dealing condition but also other unfair tactics, such as structuring the line of credit to create an inherent liquidity shortage; making premature and improper charges against Execu-

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[3] Executive Leasing also claimed that Banco's conduct in connection with the loan violated other provisions of 12 U.S.C. §1972(1). Additionally, Executive Leasing asserted pendent claims against Banco under Puerto Rico law for breach of contract and fiduciary violations.

tive Leasing's accounts; and improperly refusing to extend new credit when there was availability on the line of credit and when Executive Leasing was not in default. Executive Leasing alleged that these actions — particularly the refusal to fund and the requirement that Executive Leasing not finance its business with any other lender — caused Executive Leasing to fall behind in its loan payments, resulting in the termination of the agreement, the destruction of its business, and diminished competition in the leasing market in Puerto Rico. All this was done by Banco to benefit its leasing affiliate who, as Executive Leasing later sought to prove through its expert economists, acquired not less than 90% monopoly power in a market characterized by significant barriers to entry. Appendix at 1A-4A, 19A.

Soon after the suit was filed Banco filed a motion to dismiss and a request for an order staying all discovery. In April 1989, the District Court stayed all discovery, barring Executive Leasing from discovery until April 1993, when the District Court denied Banco's motion to dismiss and set aside the stay. In January 1994, Banco again requested and obtained an order staying all discovery while it prepared and filed its motion for summary judgment.

When Banco later filed a motion for summary judgment, it tendered certain affidavits in support thereof. Banco's affiants were among the persons whom Executive Leasing had scheduled for deposition prior to this second stay of discovery. In response, Executive Leasing requested an opportunity under Fed. R. Civ. P. 56(f) to take discovery (including depositions of Banco's affiants) to oppose the motion for summary judgment. Executive Leasing also submitted its own affidavits and internal bank documents to prove that Banco had imposed the oral tying condition.[4] Executive Leasing also of-

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[4] The Statement Under Penalty of Perjury of Luz Iraida Gonzalez Turull, which the District Court rejected as extrinsic evidence to prove the illegal oral condition, attested to the following, among other things: "Banco de Ponce stated, through the officer of the Bank directly in charge of the Executive account, that Executive was prohibited by Banco de Ponce from borrowing from Banco Central, or from any other banking institution, to finance its long term vehicle leasing operations"; "The condition or requirement imposed upon Executive, of not financing its long term vehicle leasing operations with any other banking institution, was expressly and emphatically communicated to Executive by one or more representatives of Banco

fered the affidavits of its banking expert and its expert economists to prove that the exclusive dealing condition was unusual and anticompetitive. The District Court, however, denied Executive Leasing's request for discovery and entered summary judgment on the §1972 claim on the ground that Executive Leasing had not established a genuine issue of material fact. The District Court then dismissed the pendent claims for lack of jurisdiction.

The District Court recognized that the purpose of 12 U.S.C. §1972 is "to prohibit anti-competitive practices which require bank customers to accept or provide some other product or *refrain from dealing with other parties* in order to obtain the bank product or services they desire." Appendix at 7A (emphasis added). However, the District Court refused to consider Executive Leasing's affidavits and other documents attesting to Banco's oral imposition of the exclusive dealing condition. *Id.* at 9A-11A. Instead, the District Court simply looked to the terms of the Loan Agreement, which contained no such condition. The District Court held that, "[u]nder Puerto Rico Rules of Evidence, extrinsic evidence concerning the terms of an agreement is excluded when an agreement is clear and unambiguous," citing P.R. Laws Ann. tit. 32, app. IV, R. 69(B) (1983), and that "Once a court determines that the terms of a contract are sufficiently clear, the court cannot dwell on the alleged intent of the parties at the time they entered into the contract." *Id.* at 10A-11A. Deeming the evidence of the oral condition inadmissible to prove a violation of §1972, the District Court held that Executive Leasing had

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[4] (...continued)
de Ponce more than once"; "the exclusive dealing condition or requirement imposed by Banco de Ponce upon Executive, beginning in 1983 and thereafter, was and constitutes an unusual, improper and anti-competitive banking practice"; "[t]he said exclusive dealing condition or requirement had an anti-competitive effect and injured the plaintiffs in that, among other things, it: (i) deprived Executive of the benefit of maintaining viable continuous alternative sources of financing; (ii) increased Executive's dependence on the good faith of Banco de Ponce; and (iii) enabled Banco de Ponce '... to gain full control of all vehicles and leases which Executive owned ...' and to otherwise interfere with the way in which Executive ran its long term vehicle leasing business." Executive Leasing also submitted an internal memorandum from Banco dated November 18, 1983 (shortly after Banco first extended credit), that further supported the existence of the oral tying arrangement.

failed to create a genuine issue of material fact to avert summary judgment.

In its appeal to the First Circuit, Executive Leasing argued, among other things, that the District Court had erred in awarding summary judgment on the ground that Executive Leasing's proffered evidence of an oral exclusive dealing condition could not be admitted to establish a violation of 12 U.S.C. §1972(1). Executive Leasing argued in its principal brief that Puerto Rico's parol evidence rule did not bar the admission of extrinsic evidence to prove a statutory violation. Executive Leasing argued that "the proper methodology for dealing with extrinsic evidence had to take into account that the gravamen of the Amended Complaint is that *Banco violated specific prohibitions of the BHCA* from the outset of its relations with Executive...." (Emphasis added.)[5]

The First Circuit rejected this argument and affirmed the District Court, stating: "Because no such [exclusive dealing] restriction appears in the agreement itself, and the loan agreement, by its clear language, 'constitutes the entire agreement among the parties,' the District Court rejected the plaintiffs' extrinsic evidence of the exclusive dealing condition, including their own sworn affidavits." Appendix at 25A. The First Circuit also agreed with the holding that Puerto Rico law required the exclusion of evidence of the oral tying condition.[6]

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[5] Executive Leasing's reply brief also cited federal cases recognizing that tying violations under the federal antitrust laws may be established by proof of an extrinsic course of conduct supplementing a written contract. As Executive Leasing noted in its Petition for Rehearing, counsel for Executive Leasing also argued during oral argument that the plain language of 12 U.S.C. §1972, which prohibits a bank from extending credit on any of the enumerated conditions "in any manner," requires the admission of evidence of an oral tying condition to prove a violation.

[6] Although the First Circuit stated that "the plaintiff's extrinsic evidence of the actual practice of the parties would not have blocked summary judgment on their §1972(1)(E) claim," Appendix at 21A-22A n. 5, it did not suggest by this statement that the extrinsic evidence of the oral tying condition would not have established a violation of §1972(1)(E) if admitted. Instead, as the remainder of the footnote makes clear, the First Circuit was addressing the separate and distinct issue of whether the extrinsic evidence of the parties' *course of dealing* under the loan agreement indicated that the written loan agreement was not intended as a complete and integrated expression of their agreement.

In a petition for rehearing, Executive Leasing argued that the exclusion of an oral agreement to establish a violation of a federal statute directly contradicted a decision of the Fifth Circuit under §1972. It also argued that the exclusion was contrary to the rulings of the Third, Fourth, Seventh, and Eleventh Circuits applying similar provisions of federal antitrust law; was contrary to the rulings of the Supreme Court of Puerto Rico; and violated the principle of uniform interpretation of federal law. The First Circuit Court of Appeals denied Executive Leasing's petition for rehearing without opinion.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S HOLDING THAT EXTRINSIC EVIDENCE MAY NOT BE ADMITTED TO ESTABLISH A VIOLATION OF §1972(1) CONFLICTS DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT UNDER THAT STATUTE, AND ALSO CONFLICTS WITH DECISIONS OF FOUR OTHER CIRCUITS UNDER THE ANTI-TYING PROVISIONS OF OTHER FEDERAL ANTI-TRUST LAWS.

The decision below should be reviewed and reversed because (1) it resolves an important issue of federal law in a way that conflicts directly with decisions of other federal circuits, both under §1972 and similar provisions of other federal anti-trust laws, and (2) because it reaches a fundamentally incorrect result by excluding proof of exactly the conduct that the statute prohibits.[7] The exclusion of parol evidence to establish a violation of §1972 is inconsistent with the plain language of the statute, its legislative history, and the decisions of other federal courts applying §1972 and other similar provisions of the federal antitrust laws.

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[7] Although the First Circuit held that a number of Executive Leasing's arguments had been waived, Appendix at 17A-25A, it made no such holding with respect to its objection to the exclusion of extrinsic evidence of the oral tying condition, but instead considered and squarely decided the issue. Appendix at 20A-22A.

The Court's conclusion also threatens to work mischief by leading to the non-uniform interpretation and application of a federal law. When a federal statute prohibits conduct in express terms, a plaintiff must be allowed to introduce evidence of that conduct, regardless of whether the forum state's parol evidence rule would allow its introduction in a contract action. Applying the state's parol evidence rule to exclude evidence of conduct that is specifically prohibited by §1972 undercuts Congress' intent to impose nationwide federal restrictions on anti-competitive banking practices, such as the exclusive dealing condition that Executive Leasing seeks to prove Banco imposed on its loan.

A. The Court of Appeals' Decision Creates a Conflict Between the Circuits On the Issue of Whether Evidence of an Oral Condition Is Admissible to Prove a Violation of §1972(1).

The First Circuit's decision conflicts directly with *Dibidale of Louisiana v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), *opinion amended and reinstated on rehearing*, 941 F.2d 308 (1991). In *Dibidale*, the Court vacated an award of summary judgment for the lender on a borrower's claim that an oral condition on the extension of credit violated 12 U.S.C. §1972. Plaintiff had sought a loan from the defendant lender to acquire and complete a partially built townhouse and boathouse development. Plaintiff alleged that the lender had violated §1972 by conditioning the loan on plaintiff's hiring of a particular contractor, Theriot, to finish the project. As in this case, the condition was not included in the loan documents.

To the contrary, the written loan agreement in *Dibidale* negated the argument that any such condition had been imposed. The borrower had certified in the written loan agreement that it had chosen Theriot's firm from among "numerous possible general contractors" and that it "was not coerced or forced by [the bank] in any manner to do so." 916 F.3d at 303, 307 n.4. The court deemed "without merit" the bank's assertion that plaintiff could not use parol evidence of the oral condition to establish a violation of §1972, stating:

> The terms of the loan agreement notwithstanding, the relevant issue is whether Dibidale has provided sufficient evidence that its hiring of Theriot was a condition or requirement of the loan so as to survive the banks' motion for summary judgment.

Id. at 307 n.4.

Accordingly, there is a direct conflict between, on the one hand, the decision of the First Circuit that refuses to allow a plaintiff to establish a violation of §1972 by proving an oral condition, and, on the other hand, the decision of the Fifth Circuit that allows such proof. The Court of Appeals' decision in this case should be reviewed to resolve this conflict over the interpretation and application of §1972.

Two other cases also address the issue raised by the First Circuit's opinion. In *Integon Life Insurance Corporation v. Browning*, 989 F.2d 1143 (11th Cir. 1993), the Eleventh Circuit, in affirming the grant of summary judgment for the defendant lender under the tying provisions of the Home Owners' Loan Act, 12 U.S.C. §1464, assumed without discussion (over the defendant's objections) that the trial court had properly considered parol evidence that a loan was improperly conditioned on the purchase of other property. The Eleventh Circuit thus appears to follow the Fifth Circuit and allows parol evidence to be considered.

In *Boulevard Bank Nat. Ass'n v. Adams Newspapers, Inc.*, 787 F. Supp. 122 (E.D. Mich. 1992), on the other hand, the District Court for the Eastern District of Michigan reached a conclusion that appears to take the side the First Circuit took here. In *Boulevard Bank*, the court rejected the plaintiff's claim that a lender bank had violated §1972 by conditioning the modification of a note on the bank's maintenance of a business relationship with the borrower's affiliate. The court stated: "This claim is clearly untenable. The original loan documents in no way tied the extension of credit to [the borrower] on the condition that [its affiliate's] accounts be maintained at [the lender]." 787 F. Supp. at 125.

In short, it is obvious that the conflict identified here can and will recur in other cases under §1972. It is, therefore, ripe for resolu-

tion by this Court.

B. The Court of Appeals' Decision to Exclude Evidence of an Oral Condition to Prove a Violation of §1972 Also Conflicts With Decisions of Other Circuits Under Federal Anti-Tying Statutes that Share the Same Legislative Purpose and Intent as §1972.

The Court of Appeals' decision also conflicts with the manner in which other federal circuits apply other federal anti-tying provisions that share the same legislative purpose as §1972. Section 1972 was enacted to "exten[d] to the field of commercial banking ... the general principles of the Sherman Antitrust Act prohibiting anti-competitive tying arrangements." *Integon*, 989 F.2d at 1149-1150, *citing Parsons Steel, Inc. v. First Alabama Bank*, 679 F.2d 242, 245 (11th Cir. 1982). Accordingly, courts have recognized that other federal antitrust laws provide a helpful analogy in construing §1972. *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978). *See also Integon*, 989 F.2d at 1150 (in construing anti-tying provisions of Home Owners' Loan Act, which in turn extended the same principles to federal thrifts, "it is appropriate to refer to anti-tying law as developed in both BHCA and anti-trust cases"), *citing Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 659 (9th Cir. 1988); 2B Sutherland Stat. Const. §51.03 (5th ed. 1992) (statutes that are modeled on each other and that share the same legislative purpose should be interpreted consistently to avoid thwarting the legislature's purpose).

Federal courts have unanimously allowed proof of oral agreements or conditions to establish violations of the anti-tying provisions of other federal antitrust statutes. In *Advance Business Systems & Supply Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court of Appeals affirmed judgment for the plaintiff on tying claims under the Sherman and Clayton Acts. The plaintiff had entered a written agreement to rent copying machines from the defendant. The plaintiff alleged that the defendant had imposed an extracontractual tying condition requiring the lessee to use only the defendant's copying paper and other sup-

plies with the rented copiers. The court admitted evidence extrinsic to the contract, including proof of oral statements made by the defendant, to establish the tying violation. The court held that even though the illegal condition was not included in the written rental agreement,

> [a]n illegal tying arrangement may be shown to exist, however, even where it is not imposed by means of an express contractual provision. The presence of the illegal condition may be inferred from an *extrinsic course of conduct supplementing the written contract.*

415 F.2d at 64 (emphasis added).

The court in *Advance Business Systems* supported this conclusion by noting that an illegal tying condition "is no less invalid when it is written into a formal contract than when it is imposed by means of coercive or fraudulent practices." 415 F.2d at 66. "[I]mplied contracts, like express contracts, may be 'held over the heads of vendees [and] deny defendant's competitors access to the fenced-off market on the same terms as the defendant.'" *Id.* at 64, *quoting Northern Pacific Ry. v. United States*, 356 U.S. 1, 12 (1958).

Similarly in *Osborn v. Sinclair Refining Company*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), the court reversed judgment for the defendant on a tying claim under the Sherman Act where the plaintiff alleged that the defendant had imposed an oral tying condition on a written lease. The court held that an oral agreement requiring plaintiff to purchase substantial quantities of a related product from the defendant evidenced a tying violation, and stated: "... an agreement, arrangement, or condition which unreasonably restrains trade in itself by price fixing, boycotts, or tie-ins, *need not be expressly embodied in written contracts.* Such arrangements may be deduced from a course of conduct...." *Id.* at 837 (emphasis added).[8]

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[8] *See also Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 977 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) (affirming judgment for plaintiff on tying

The Court of Appeals' decision should be reviewed because it impermissibly affords §1972 a far more limited scope than other federal antitrust statutes prohibiting tying arrangements, even though §1972 shares the same legislative purpose that motivated those prohibitions.

II. THE COURT OF APPEALS' DECISION IMPERMISSIBLY ALLOWS STATE LAW TO THWART CONGRESS' INTENT IN ENACTING UNIFORM FEDERAL PROHIBITIONS ON BANKING PRACTICES UNDER §1972.

A. The Court's Exclusion of Evidence of an Oral Tying Condition Directly Contradicts Congress' Intent, as Evidenced in the Plain Language of §1972 and Its Legislative History, to Prohibit All Anti-Competitive Tying Conditions on Lending Regardless of How They Are Imposed.

12 U.S.C. §1972(1)(E) provides that banks shall not, "in any manner," extend credit on the condition "that the customer shall not obtain some other credit, property, or service from a competitor of

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[8] (...continued)
claim under Sherman Act as against defendants' claims that franchise agreement on its face allowed the purchase of other units; "The presence of the illegal tying condition may be inferred from an extrinsic course of conduct supplementing the written contract"); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (presence of illegal condition may be inferred from course of conduct extrinsic to contract); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450-452 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959) ("Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all of the circumstances"; fact that written franchise agreement contained no provision requiring plaintiffs to deal exclusively in goods supplied by defendant would not be fatal to tying claim if plaintiff could demonstrate illegal condition or understanding from extrinsic course of conduct); *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499, 504 (E.D. Pa. 1982) (rejecting defendant's argument that absence of exclusive dealing agreement in written contract supported motion for summary judgment on tying claim under Clayton Act).

such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit." (Emphasis added.) The statute itself contains no parol evidence rule. Nor does the statute suggest that such a condition will be tolerated so long as it is not included in the written contract. To the contrary, the statute prohibits the imposition of such conditions "in any manner"; this language could not indicate any more clearly that illegal tying conditions are prohibited *regardless of how they are imposed.*

The statute's legislative history shows that Congress emphatically meant what it said. Congress enacted §1972 to respond to President Richard M. Nixon's concerns about the "disturbing trend in the past year toward erosion of the traditional separation of powers between the suppliers of money — the banks — and the users of money — commerce and industry," and his concerns that "[b]anking must not dominate commerce or be dominated by it." Supplementary Views of Edward W. Brooke, S.Rep. No. 91-1084, P.L. 91-607, 1970 U.S. Code of Cong. & Adm. News 5519, 5557.

As Senator Brooke, one of the sponsors of the amendment, explained in the Senate Report accompanying the enactment of the bill,

> The purpose of this section is to eliminate anticompetitive *practices* which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.
>
> * * *
>
> Thus, [this statute] proscribes tying, reciprocity, and exclusive dealing arrangements involving banks. Specifically, this section prevents banks from extending credit, leasing or selling property, furnishing any service, or fixing or varying the consideration for any of the foregoing, upon *any* condition, agreement or *understanding, either overt or tacit,* that the customer ... shall not obtain some other credit, property or

> service from a competitor of the bank or of some affiliate of the bank.

Id. at 5558 (emphasis added).

Again, Senator Brooke stated:

> It is important to note that 'per se' illegality arises where *either express or implied coercion* is involved. Thus, where the *totality of the circumstances* indicates that the customer has not voluntarily entered into the transaction but rather has been induced into doing so through *coercion, either express or implied*, the conduct under consideration is actionable under this provision.

112 Cong. Rec. 42432 (1970) (emphasis added.)

Congress' stated concern with anticompetitive "practices"; its intent to prohibit exclusive dealing arrangements that result from "conditions," "agreements," or "understanding[s], either overt or tacit"; its statement that tying may consist of "express or implied coercion" that may be inferred from "the totality of the circumstances"; and its express prohibition of the imposition of such conditions "in any manner" establishes that Congress unequivocally intended the prohibitions in §1972 to apply to oral conditions.

The First Circuit's refusal to entertain Executive Leasing's claim that Banco imposed an oral tying condition in violation of §1972 should be reviewed and reversed because it directly contradicts the plain language of the statute and the intent of Congress.

B. The First Circuit's Decision Impermissibly Allows State Law to Frustrate Congress' Intent to Prohibit Oral Tying Arrangements and Makes the Scope of Federal Prohibitions Depend on the Vagaries of State Law.

The First Circuit also erred because Puerto Rico's parol evidence rule cannot be applied to thwart the purpose of §1972. This Court has consistently held that a state rule cannot be applied if it conflicts with the purpose and effect of a federal statute.

For example, in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court held that state rules of estoppel could not be applied in contravention of the purposes of a federal antitrust statute. Plaintiff had sued to recover royalties under a patent licensing agreement. The defendant claimed that a price-fixing stipulation in the patent license violated the Sherman Act. The District Court held that the defendant was estopped from asserting the invalidity of the license under the Sherman Act as a defense. The Court reversed, holding that the state estoppel doctrine so conflicted with the Sherman Act's prohibition of price-fixing that the federal court should reject its application. The Court stated:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64. ... [T]he doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. [Citations omitted.] *When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.* To the federal stat-

ute and policy, conflicting state law and policy must yield.

317 U.S. at 176 (emphasis added).

Similarly in *Dietrick v. Greaney*, 309 U.S. 190 (1940), this Court considered the question of whether the maker of a note could assert the invalidity of the transaction under the National Bank Act as a defense to payment. This Court rejected the argument that state law governed the question of whether the defense could be asserted, stating:

> But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted [citations omitted].

309 U.S. at 200-201.

In *Awotin v. Atlas Exchange National Bank of Chicago*, 295 U.S. 193 (1935), this Court summarily rejected the argument that the law of restitution of the forum state would allow a party who purchased securities from a bank to recover on the bank's agreement to repurchase the securities "without recourse," where such an agreement was prohibited by a federal banking statute. The Court stated:

> National banks are public institutions and *the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities*, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. *The prohibition would be nullified* and the evil sought to be avoided would persist, *if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them.*

295 U.S. at 214. *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (rejecting application of common-law state rule against enforcement of executory agreements to arbitrate in favor of federally fashioned rule where state rule would "undercut" the Labor Management Relations Act and "defeat its policy"; Congress "adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule ... against enforcement of executory agreements to arbitrate").[9]

The First Circuit's decision in this case should be reviewed and reversed because the application of Puerto Rico's parol evidence rule would drastically limit the scope of §1972 in cases brought in Puerto Rico and thwart Congress' absolute and unequivocal intent to prohibit tying conditions, whether written or oral, overt or tacit. *See* discussion above at Section II.A.

Additionally, application of state parol evidence rules to determine whether an oral condition is actionable under §1972 would make the substantive prohibitions of a federal statute depend on the law of the forum in which the District Court sits. Where Congress intended its tying prohibitions to apply comprehensively as a matter of national policy, such non-uniform interpretation and application of the statute cannot be tolerated. *Jerome v. United States*, 318 U.S. 101, 104 (1943) (interpretation of federal statute of nationwide application is generally not dependent on state law); *Reconstruction Finance*

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[9] Federal courts have disregarded state parol evidence rules where their application would thwart or interfere with the purpose or effect of a federal statute. *See, e.g., Grainger v. State Security Life Ins. Co.*, 547 F.2d 303, 306 (5th Cir. 1977), *cert. denied*, 436 U.S. 932 (1978) (rejecting application of parol evidence rule to bar evidence of advertising and promotional efforts to determine whether an instrument was a "security" under the federal securities acts); *The Hammond Group, Inc. v. Republic National Life Ins. Co.*, CCH Fed. Sec. L. Rep. ¶95,456 at 99,306 (S.D.N.Y. 1976) (rejecting New York parol evidence rules in federal securities action; "Those rules, representing substantive law of the State of New York, do not prevent plaintiff from pleading oral discussions as constituting part of an actionable scheme to defraud under Rule 10b-5, simply because these conversations would be excluded in a contract or equity action."); *Roberts v. Poole*, 80 B.R. 81, 86 (N.D. Tex. 1987) (state parol evidence principles did not apply to determining whether debt was nondischargeable under federal bankruptcy laws).

Corp. v. Beaver County, Pa., 328 U.S. 204, 209 (1946) (Congress normally intends uniformity in the application of its laws in order that federal programs may operate unimpaired); *First National Bank v. Hasty*, 415 F. Supp. 170 (E.D. Mich. 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977) (it would be highly inconsistent for the federal Consumer Credit Protection Act, which was intended to install uniform national standards, to be interpreted in such a way that the remedy would vary from state to state). Puerto Rico's parol evidence should not be applied to bar proof of an oral condition as a violation of §1972.

CONCLUSION

For all the reasons stated above, Executive Leasing's petition for certiorari should be granted. The First Circuit's decision on the important federal issue discussed above creates a conflict among the circuits and, if left standing, would defeat Congress' clear intent and purpose under the BHCA.

Respectfully submitted,

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